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698 229—63

# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 286

W. M. MILES, ET AL., PETITIONERS

*v.*

LAURIE W. TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINION BELOW

The findings of fact and conclusions of law (R. 409–420) of the district court are not officially reported. The opinion of the court of appeals (Pet. 34–43) is reported at 316 F. 2d 710.

### JURISDICTION

The judgment of the court of appeals was entered on April 29, 1963. (Pet. 44–45.) A petition for rehearing was denied on May 27, 1963. (Pet. 46.) The petition for a writ of certiorari was filed on July 18, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the court of appeals correctly held that a corporation which was formed for business reasons and which engaged in substantial business activities by acquiring, holding, managing, and selling real estate, was taxable as a corporate entity for federal income tax purposes.

## STATUTES INVOLVED

Sections 13(b)(1) and (2), 15(b)(1) and (2), 22(a), and 52 of the Internal Revenue Code of 1939 are set forth in relevant part in the Appendix, pp. 12–13, *infra*.

## STATEMENT

This was an action brought by the taxpayers (W. M. Miles and Edith P. Miles, his wife; H. E. Pontius and Lovina B. Pontius, his wife, and Ralph A. Marsicano and Marie B. Marsicano, his wife) for a refund of corporate income taxes which were assessed against and collected from them as transferees of the assets of the Milspinmar Corporation, in which they were the sole stockholders at the time of the assessment. The taxes were assessed with respect to the operations of Milspinmar during the calendar years 1950 through 1953, inclusive. (R. 2, 409.)

*The formation of the corporation.*—In 1946, Mr. Miles, Mr. Pontius, and Mr. Marsicano, together with an unmarried associate, Louis Spiner, desired to buy some land from a local Drainage District for $9,800. This amount was paid by checks from Miles, Pontius, and Spiner for $2,500 and a check from Marsicano for $2,300. Marsicano later paid $200 for title insur-

ance, recording fees and incidental expenses. Before the deed was received, the Milspinmar Corporation was formed. Marsicano, the group's lawyer, formed the corporation because of the problem of "trying to get seven people owning a piece of property together * * * to sign a contract or a deed or something like that * * *" and he concluded that forming the corporation "was the best way to take the title so that the seven beneficial owners would not be hampered with a multiplicity of signatures and a lot of complexities in the event we sold the property." (Pet. 35.)

The corporate formalities were completed on August 19, 1946. On September 5, 1946 the first and only formal meeting of the Board of Directors was held, although informal meetings were held yearly from 1946 through 1953 when business needs required. (R. 304–305; 308–309; Deft. Ex. 1–2.) At the time of the formal September, 1946, meeting a resolution was adopted reciting the purchase of the Drainage District property by the individual parties, their proportionate ownership thereof, and their desire and decision to take record title in the name of the new corporation for the use and benefit of the individual parties "in order to facilitate the payment of ad valorem and drainage district taxes and to expedite the conveyance of all or any part of the property as it might be sold. The resolution further provided that "the Corporation shall convey by good and sufficient deed, all or any part of the above described property to such grantees as the said beneficial owners above named may from time to time designate"

and that "the Secretary of this Corporation shall issue to each of the aforementioned beneficial owners, a certified copy of this Resolution as evidence of their ownership and interest in the * * * property." (Pet. 35–37.)

Pursuant to the above resolution a deed was received by Milspinmar from the Drainage District and filed for record. (Pet. 37.)

At the formal September, 1946, meeting the Secretary-Treasurer announced that "he had on hand the amount of $1,000.00 in full payment of all of the capital stock of the Corporation, and that such amount represented the amount of capital with which the Corporation would begin business." The Corporation directed that he should deposit "the full amount of said capital of the Corporation in the name of the Corporation at the new State Bank of West Tampa * * * and that checks would be drawn on said account in the name of the Corporation when signed by the Secretary-Treasurer and counter-signed by any one of the other officers." (Pet. 37–38.)

*The Business Activities of the Corporation.*—Pursuant to action taken at the September, 1946, meeting, the Corporation commenced conducting business in its own name as a separate entity. Mr. Marsicano advanced the $1,000 with which the Corporation bank account was opened. This money was used to pay outstanding ad valorem and Drainage District assessments. Subsequently, on November 1 and December 12, 1946, the Corporation received $733.30 representing the proceeds from the sale of timber off the lands. This money was also used to pay the taxes and drainage

assessments, which totalled a little more than $1500. (Pet. 38.)

In 1947, when Spiner wished to withdraw from the venture, the parties agreed to give him a particular portion of the property. He received part of the land, gave his deed to the other stockholders and transferred his stock in the Corporation to the other stockholders. Spiner also received an assignment of a purchase money mortgage representing his share of the assets then held in the Corporation's name. (Pet. 38.)

In 1947 the Corporation acquired an additional 10 acre tract of land for approximately $500 in order to connect up the northern portion of its original tract with the whole. (R. 261–262.) The Corporation sold pieces of its real estate in seven separate transactions, in one of which it repurchased a piece of land it had sold to one Bidwell in 1948. The documents for these transactions were executed in the name of the Corporation and security instruments were received in the Corporation's name. Proceeds were placed in the Corporation's bank account and checks were issued in the name of the Corporation. Also, the Corporation executed assignments, satisfactions and partial releases of mortgages which were obtained as partial payment when the sales were made. (Pet. 39.)

The proceeds from the foregoing timber sale, the real estate sales, and all interest which accrued and was paid on the debts secured by the purchase money mortgages taken by the Corporation, were received by Milspinnar and deposited in its bank account. This bank account was used to pay the expenses in-

curred by the Corporation. These expenses included survey expenses, clerical expenses, real estate taxes on corporate property, Drainage District assessments, title insurance, state capital stock taxes, and brokerage expenses. (R. 224–225, 232–238; Defts. Exs. K–P.) The Corporation from time to time would issue checks to the stockholders, usually in proportion to their stock interest in the corporation. These checks represented the proceeds from the various transactions Milspinmar entered into, after the payment of the foregoing expenses and the maintenance of a small balance in the account for corporate needs. (Supp. R. 28–30, Defts. Ex. L–2.) During the period from November 1, 1946, to December 31, 1953, there were 35 deposits made in Milspinmar's bank account totaling $161,000 and 101 checks drawn on this account. (Supp. R. 27, 30; Deft. Ex. L–2.)

Milspinmar never filed any federal income tax returns but it did file yearly Florida state corporate stock tax returns. In each of these returns, Milspinmar was described by its officers as being an "active" corporation. (R. 306–311; Deft. Ex. I–2.)

Taxpayers reported the gain realized on the sales of the Milspinmar real estate in their individual income tax returns. On examination of these returns the existence of Milspinmar was discovered, and the Commissioner treated the gain on sales of the real estate made during the period in question as taxable to the corporation and assessed deficiencies in accordance with this determination. Since the corporation had distributed all of its assets at the time that the exami-

nation was conducted, transferee assessments were made against the individual taxpayers. (R. 409.)

The taxpayers paid the assessments against them, filed timely claims for refund, and brought this action in the district court when the refund claims were disallowed. The district court found for the taxpayers. (R. 409–420.) The court of appeals reversed, holding that the corporation was taxable as a separate entity.

## ARGUMENT

The decision of the court of appeals in this case is based on well-established principles of federal tax law. There are no conflicting decisions, and there is no reason for review by this Court. In essence, the case is one in which a closely held corporation, in its own name, performed numerous business transactions. The court of appeals was clearly correct in holding the corporation to be a taxable entity.

1. The taxpayers contend that the court of appeals has misconstrued and misapplied the holding of this Court in *Moline Properties* v. *Commissioner*, 319 U.S. 436. In *Moline* it was held (pp. 438–439) that "Whether the purpose [of the formation of a corporation] be to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation the corporation remains a separate taxable entity."

In the case at bar it is perfectly clear from the record that Milspinmar was formed for a business purpose and it is equally clear that business activity was actually carried on by Milspinmar in its own name and for its own account, thereby fulfilling both of the alternative requirements of *Moline* for recognition of the corporation as a taxable entity. Milspinmar was originally chosen to hold title to the property because of the numerous difficulties which would have been involved in having the ownership divided among one individual and three married couples, and the facts show that the corporate entity was fully utilized in carrying on business activities. As the court of appeals found (Pet. 42):

> * * * it cannot be gainsaid that what was done by Milspinmar Corporation in the acquisition and recording of title to the land in question, the surveying of the land, the paying of taxes on it, the searching of titles, the sale of timber from it, the negotiation of contracts for its sale in different parcels, its actual sale, its receipt of purchase money security deeds, its release of these security deeds and its satisfaction of these deeds of record, together with the other activities naturally flowing from these transactions, such as the reacquisition of a tract from one purchaser, the acquisition of an additional tract in order to clear title, are the "equivalent of business activity," and amount to "the carrying on of business by the corporation." * * *

2. The district court held, and taxpayers now contend, that the corporation was not a taxable entity in this case because it acted as an agent. It is not disputed that the doctrine of *Moline Properties* v. *Com-*

*missioner, supra*, does not foreclose a corporation from acting in a true fiduciary or agency relationship with respect to property, without having the income from that property taxable to it. See *National Carbide Corp.* v. *Commissioner*, 336 U.S. 422, 437–438. The corporation in this case, however, did not purport to act as a fiduciary or agent, but acted for itself. The ingredients of the alleged fiduciary relationship here were essentially the same as in any closely held corporation: the fact that the corporation was owned and controlled by its alleged principals or beneficiaries. These ingredients were not enough to make the corporation a true agent or fiduciary within the meaning of the *National Carbide* case, for as the Court there said, (336 U.S. at 437) "If the corporation is a true agent, its relations with its principal must not be dependent upon the fact that it is owned by the principal, if such is the case. Its business purpose must be the carrying on of the normal duties of an agent."

3. Contrary to taxpayers' contention, the decision below is not in conflict with *Paymer* v. *Commissioner*, 150 F. 2d 334 (C.A. 2). In *Paymer*, real estate which was owned by a partnership of two brothers was transferred to two separate corporations to protect the property from attachment by a creditor of one of the brothers. A stockholders' resolution was adopted which provided for retention by the stockholders of the beneficial interest in the property. One of the corporations did nothing with respect to the property it acquired, other than to hold it. The court of appeals held that this corporation was not an entity for tax purposes. The other corporation participated

in one transaction: Its name was used in connection with a $50,000 loan obtained upon the property. This one act was sufficient for the court, relying on *Moline Properties*, to find that the corporation was a taxable entity. See 150 F. 2d at 336–337. This aspect of the *Paymer* case confirms the correctness of the decision of the court of appeals in the present case.

The court of appeals decision here is in conformity with a line of cases holding that where a corporation is either formed for a business purpose or carries on business activity it may not be disregarded as an entity for tax purposes. *Moline Properties* v. *Commissioner, supra; National Carbide Corp.* v. *Commissioner, supra; Whitfield's Estate* v. *Commissioner*, 192 F. 2d 494 (C.A. 5); *Gregg Co. of Delaware* v. *Commissioner*, 239 F. 2d 498 (C.A. 2); *Skarda* v. *Commissioner*, 250 F. 2d 429 (C.A. 10); *O'Neill* v. *Commissioner*, 271 F. 2d 44 (C.A. 9); *Wattley* v. *Commissioner*, 275 F. 2d 461 (C.A. 2); *National Investors Corp.* v. *Hoey*, 144 F. 2d 466 (C.A. 2); *Commissioner* v. *State-Adams Corp.*, 283 F. 2d 395 (C.A. 2), certiorari denied, 365 U.S. 844; *Hagist Ranch, Inc.* v. *Commissioner*, 295 F. 2d 351 (C.A. 7).

4. Taxpayers' final contention is that the appellate court's decision cannot be squared with various decisions of the Tax Court, some of which were rendered after this Court's decisions in *Moline Properties* and *National Carbide*. Even if this be so, the present decision is in complete conformity with the uniform course of appellate judicial decisions, and, therefore, there is no conflict of decisions of the character which calls for this Court's review.

## CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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AUGUST 1963.

# APPENDIX

## INTERNAL REVENUE CODE OF 1939

**SEC. 13[1] [As amended by 121 of the Revenue Act of 1950, c. 994, 64 Stat. 906]. NORMAL TAX ON CORPORATIONS.**

* * * * * *

(b) IMPOSITION OF TAX.—

(1) TAXABLE YEARS BEGINNING AFTER JUNE 30, 1950.—In the case of taxable years beginning after June 30, 1950, there shall be levied, collected, and paid for each taxable year upon the normal-tax net income of every corporation * * *.

(2) CALENDAR YEAR 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the normal-tax net income of every corporation * * *.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 13.)

**SEC. 15[2] [As added by Sec. 201 of the Revenue Act of 1940, c. 419, 54 Stat. 516, as amended by Sec. 104(a) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and as amended by Sec. 121(c) of the Revenue Act of 1950, *supra*]. SURTAX ON CORPORATIONS.**

* * * * * *

(b) IMPOSITION OF TAX.—

(1). TAXABLE YEARS BEGINNING AFTER JUNE 30, 1950.—In the case of taxable years beginning after

[1] The amendment of this section by Section 121(a) of the Revenue Act of 1951, c. 521, 65 Stat. 452, made no changes material to this case.

[2] The amendment of this section by Section 121(a) of the Revenue Act of 1951, *supra*, made no changes material to this case.

June 30, 1950, there shall be levied, collected, and paid for each taxable year upon the corporation surtax net income of every corporation * * *.

(2) CALENDAR YEAR 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the corporation surtax net income of every corporation * * *.

* * * * * *

(26 U.S.C. 1952 ed., Sec. 15.)

**SEC. 22. GROSS INCOME.**

(a) GENERAL DEFINITION.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * * *

(26 U.S.C. 1952 ed., Sec. 22.)

**SEC. 52. CORPORATION RETURNS.**

(a) REQUIREMENT.—Every corporation subject to taxation under this chapter shall make a return * * *.

(26 U.S.C. 1952 ed., Sec. 52.)

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